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Office of Administrative Law Judges
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Issue Date: 27 May 2005

Case No. 2004-BLA-5431

In the Matter of

JOHN CHANEY,
Claimant,

v.

WOODS CREEK CORP.,
Employer,

KY COAL PRODUCERS S-I FUND,
c/o ACORDIA EMPLOYERS SERVICE CORP.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Monica Rice Smith, Esq., attorney at hearing
Edmond Collett, Esq., attorney of record
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Hyden, Kentucky
For the Claimants

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Harlan, Kentucky
For the Employer

Neil Morholt, Esq.
U.S. Department of Labor
Office of the Solicitor
Nashville, Tennessee
For the Director

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (hereinafter the Act), 30 U.S.C. § 901 et seq., and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On December 11, 2003, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a hearing. (DX 38).[1] A formal hearing in this matter was conducted on February 8, 2005, in London, Kentucky, by the undersigned. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder. The opinion which follows is based on all relevant evidence of record.

ISSUES[2]

The issues in this case are:

1. Whether the claim was timely filed;

2. Length of coal mine employment;

3. Whether the named Employer is the Responsible Operator;

4. Whether the Claimant has pneumoconiosis as defined in the Act and regulations;

5. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

6. Whether the Claimant is totally disabled; and,

7. Whether the Claimant's disability is due to pneumoconiosis.

(TR 10-11; DX 38).

[1] In this Decision and Order, "DX" refers to the Director's exhibits, "EX" refers to the Employer's exhibits, "CX" refers to the Claimant's exhibits, "ALJX" refers to the undersigned's exhibits, and "TR" refers to the transcript of the hearing.

[2] The parties stipulated to the Claimant being a miner and post-1969 employment. (TR 10-11). The Employer also agreed to at least ten years of coal mine work. (TR 11). The issue of dependency was erroneously listed as contested because the Claimant does not allege any dependents. (DX 38).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

The Claimant, John Chaney, was born on June 29, 1937 and has a high school education. (TR 12; DX 3). He alleges no dependents for the purposes of augmentation. (TR 12-13; DX 3).

The Claimant asserts approximately thirty years of coal mine employment. (DX 3). At the hearing, the Claimant testified that he began working in 1955 with Caudill and Ward Coal Company as an underground cutting machine operator and general laborer. (TR 14). Next, the Claimant worked at Bear Coal Company in Virginia for about three years, underground hand loading coal. (TR 14-15). Then, the Claimant was employed by Whitey Coal Company for two years where he performed similar work. (TR 15). For the following year, the Claimant worked at Pike County Coal Co. as a cutting machine operator. (TR 16). The Claimant's subsequent job was with Belaire Coal Company for three years where he performed his previous duties. (TR 17). The Claimant continued doing the same work with Kentland, Elkhorn Coal Company for three years. Id. The Claimant next was employed by Chaney Coal and Chaney Creek Coal for about ten to twelve years. (TR 17-18). He was the owner of those two companies and operated underground continuous miners. (TR 18). Last, the Claimant was employed by Woods Creek Corporation for over a year where he ran a continuous miner. (TR 18-19). After his coal mine employment, the Claimant performed consultative work involving mine layouts. (TR 20). He was not exposed to any coal dust in that employment. (TR 27). However, the Claimant testified that in his other jobs he was exposed to coal dust. (TR 21).

The Claimant's treating physician is Dr. Chatterjee, and he is seen by Dr. Becknell for his breathing problems. (TR 21-22). He is prescribed an inhaler and a nebulizer. (TR 22). The Claimant complains of shortness of breath, cough, sputum production, dyspnea on exertion, and smothering at night which causes him to awaken four or five times. (TR 23-24). He stated that he can no longer hunt or fish because of his breathing problems. (TR 23). The Claimant testified that he had open-heart surgery in 1995 and pleurisy. (TR 24-25). He currently has diabetes. (TR 23).

The Claimant is a former smoker. (TR 25). He stated that he quit smoking two or three years ago, but he told Dr. Dahhan in June 2003 that he had cut down to a pack a week. Id. He testified that after that he completely quit. Id. The Claimant began smoking at age eighteen. Id. However, he did not testify to the rate at which he smoked. Therefore, I find at this time there is not adequate evidence of record to make an accurate smoking history determination.

The Claimant filed his first application for benefits on March 18, 1992. (DX 1). The claim was denied by the Office of Worker's Compensation Programs and after a request for a formal hearing, also denied by an Administrative Law Judge on June 23, 1994. Id. The Claimant made a timely request for modification and the District Director again denied the claim on

August 23, 1995. Id. After a request for a formal hearing, another Administrative Law Judge issued a denial of benefits on March 18, 1998. Id. The Claimant appealed to the Benefits Review Board (hereinafter the Board) who affirmed the Administrative Law Judge's findings on March 19, 1999. Id.

The current application for benefits was filed on April 2, 2002. (DX 3). The District Director issued a Proposed Decision and Order denying benefits on September 2, 2003. (DX 30). This matter was transferred to this office after the Claimant submitted a request for a formal hearing conducted by an Administrative Law Judge. (DX 31, 38).

Dependency:

The Claimant alleges no dependents for purposes of augmentation. (TR 12-13; DX 3). Therefore, I find the Claimant has no dependents for purposes of benefit augmentation.

Length of Coal Mine Employment:

The Claimant alleges approximately thirty-years of coal mine employment. (DX 4). The Employer stipulated to at least ten years of coal mine work. (TR 11). The District Director made a finding of twenty-four years. (DX 30). This is consistent with the most probative documentary evidence of record including the Claimant's Social Security earnings report, W-2 forms, and payroll stubs. (DX 6, 8-9). Accordingly, I find that the Claimant was a coal miner, as that term is defined by the Act and Regulations, for a period of twenty-four years. He last worked in the Nation's coal mines in 1988. (DX 8-9).

Responsible Operator:

Woods Creek Corporation has been named as the potential responsible operator in this case. It does not concede that it is the responsible operator.

The Claimant stated that he worked for the Employer for two terms, from March 1987 to December 1987 and from January 1988 to July 1998. (DX 7). The Claimant's Social Security Earnings report and W-2s indicate employment with Woods Creek Corporation in 1987 and 1988. (DX 8-9).

In Clark v. Barnwell Coal Co., 22 B.L.R. 1-275 (2003), the Benefits Review Board stated that § 725.493(b) "contemplates a two-step inquiry into the miner's employment to determine if an employer is the responsible operator." The inquiry is as follows:

> First, the administrative law judge must determine whether the miner worked for an operator for one calendar year or partial periods totaling one calendar year. Then, if the administrative law judge finds that the threshold one-year requirement is met, the administrative law judge must determine whether the miner's employment was regular. (citations omitted). Thus, a mere showing of 125 working days does not establish one year of coal mine

> employment. (citations omitted). In determining the length of the miner's coal mine employment, the administrative law judge may apply any reasonable method of calculation.

Id.

In determining the length of the miner's coal mine employment, the administrative law judge may apply any reasonable method of calculation. See Clark v. Barnwell Coal Co., 22 B.L.R. 1-275, 1-280 - 1-281, BRB Nos. 01-0876 BLA and 02-0280 BLA (Apr. 30, 2003). From the Claimant's affidavit and his Social Security Earnings report, Woods Creek Corporation employed the Claimant to two terms that constitute more than one year. (DX 7-9). Furthermore, the above-mentioned evidence, indicates that, although he worked two separate periods for the Employer, his work during those terms was regular. Id. Therefore, I find the Claimant was employed by Woods Creek Corporation for time totaling over one year, and that employment was regular. Accordingly, liability is not shifted. I find that Woods Creek Corporation is properly designated the responsible operator herein.

Timeliness:

Under section 725.308(a), a claim of a living miner is timely if it is filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. The record contains no supporting evidence that establishes a diagnosis of total disability due to pneumoconiosis was ever directly communicated to the Claimant. Therefore, I find the Employer did not rebut this presumption, and this claim was timely filed.

Applicable Regulations:

Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. Amendments to the Part 718 regulations became effective on January 19, 2001. As this claim was filed on April 4, 2002, such amendments are applicable.

The 2001 amendments significantly limit the development of medical evidence in black lung claims. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in a single medical report must comply individually with the evidentiary limitations. Id. In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, biopsy or autopsy. § 725.414(a)(2)(ii). Likewise, employers and the District Director are subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i, iii).

Subsequent Claim:

In cases where a claimant files more than one claim and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial unless there has been a material change in condition or the later claim is a request for a modification. Section 725.309 (d). The Claimant's previous claim was a request for benefits which was denied by an Administrative Law Judge and affirmed by the Board on March 19, 1999. (DX 1). The current claim was filed on April 2, 2002, not within one year of the prior denial, so that it cannot be construed as a modification proceeding pursuant to Section 725.310(a). Therefore, according to Section 725.309(d) this claim must be denied on the basis of the prior denial unless there has been a material change in condition.

Section 725.309(d) provides that a subsequent claim must be denied unless the Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. §725.309(d)(2). If the Claimant establishes the existence of one of these conditions, he has demonstrated, as a matter of law, a material change. If he is successful in establishing a material change, then all of the record evidence must be reviewed to determine whether he is entitled to benefits.

The previous claim was denied and affirmed by the Board when it was determined that the Claimant failed to establish the existence of pneumoconiosis, causation, total disability, or total disability arising out of pneumoconiosis. (DX 1). Accordingly, the newly submitted medical evidence will be reviewed in order to determine whether there has been a material change in condition.

Pneumoconiosis:

Section 718.202(a) sets forth four alternate methods for determining the existence of pneumoconiosis. Pursuant to Section 718.202, the Miner can demonstrate pneumoconiosis by means of 1) x-rays interpreted as positive for the disease, or 2) biopsy or autopsy evidence, or 3) the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable, or 4) a reasoned medical opinion which concludes the presence of the disease, if the opinion is based on objective medical evidence such as pulmonary function studies, arterial blood gas tests, physical examinations, and medical and work histories.

Under Section 718.202(a)(1), a finding of the presence of pneumoconiosis may be based upon a chest x-ray conducted and classified in accordance with Section 718.102. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis.

The newly submitted medical evidence consists of four x-rays with nine interpretations. An x-ray dated April 29, 2002 was interpreted as positive for pneumoconiosis with a 1/1 profusion by Dr. Simpao, who has no special radiological qualifications. (DX 11). He also listed sternotomy wire. Additionally, Dr. Sargent re-read the x-ray, making no determinations with

respect to pneumoconiosis. Id. However, he did record previous CABG procedure, abnormalities of the cardiac size of shape, and fractured ribs. Dr. Sargent is a Board-certified radiologist and B-reader.[3] This x-ray was also interpreted as negative for pneumoconiosis by Dr. Poulos who noted status post CABG, old healed fracture sites of fifth through eighth ribs on the right. (DX 21). Dr. Poulos is a B-reader and Board-certified radiologist.

Dr. Broudy, a B-reader, interpreted an x-ray dated July 2, 2002. (DX 14). On the Department sponsored "ILO" form, he did not indicate if the film was negative or positive. However, he made no other notations indicating profusions or opacities. Moreover, in his medical report, he listed that the x-ray did not show coal workers' pneumoconiosis. As such, I find this to constitute a negative x-ray reading. Furthermore, this x-ray was re-read as positive with a 1/0 profusion by Dr. Alexander. (CX 2, 4). He also reported mild cardiac enlargement, prior CABG surgery, and small calcified granulomas in the right lung base. Dr. Alexander is a B-reader and Board-certified radiologist.

A June 4, 2003 x-ray was interpreted as negative for pneumoconiosis by Dr. Dahhan, a B-reader. (DX 23). He listed post mediastinotomy changes. In addition, this x-ray was re-read as positive with a 1/0 profusion by Dr. Alexander. (CX 3-4). He also noted mild cardiac enlargement and small calcified granulomas in the right lung base. As mentioned above, Dr. Alexander is a B-reader and Board-certified radiologist.

Dr. Baker, a B-reader, interpreted a May 28, 2003 x-ray as positive for pneumoconiosis with a 1/0 profusion. (DX 23A). Dr. Baker also recorded post-operation changes and fractured ribs. Furthermore, this x-ray was also interpreted as negative for pneumoconiosis by Dr. Poulos who noted status post CABG. (DX 27). Dr. Poulos is a B-reader and Board-certified radiologist.

Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. Dixon v. North Camp Coal Co., 8 BLR 1-344 (1985). Thus, it is within the discretion of the administrative law judge to assign weight to x-ray interpretations based on the readers' qualifications. Goss v. Eastern Associated Coal Co., 7 BLR 1-400 (1984). Accordingly, great weight may be assigned to an x-ray interpretation of a B-reader. Aimone v. Morrison Knudson Co., 8 BLR 1-32 (1985). In addition, even greater weight may be assigned to an x-ray interpretation of a board-certified radiologist. Roberts v. Bethlehem Mines Corp., 8 BLR 1-211, 1-213 n. 5 (1985). In this case, Dr. Simpao, who has no radiological credentials, read an x-ray as positive but it was re-read by a B-reader and Board-certified radiologist as negative. Also, Dr. Baker, a B-reader, interpreted an x-ray as positive that was subsequently read as negative by a more highly qualified physician. Conversely, Drs. Broudy and Dahhan,

[3] A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the United States Department of Health and Human Services. 42 C.F.R. § 37.51. The qualifications of physicians are a matter of public record at the National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. Because B-readers are deemed to have more training and greater expertise in the area of x-ray interpretation for pneumoconiosis, their findings may be given more weight than those of other physicians. Taylor v. Director, OWCP, 9 BLR 1-22 (1986).

B-readers, interpreted x-rays as negative which were re-read as positive by a B-reader and Board-certified radiologist. Therefore, two x-rays were read as positive by a highly qualified physician and two x-rays were interpreted as negative by a highly qualified physician. Accordingly, the x-ray evidence stands in equipoise. As such, the Claimant has not established the existence of pneumoconiosis, by a preponderance of the evidence, pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

The fourth and final way to establish the existence of pneumoconiosis is set forth in Section 718.202(a)(4). This subsection provides for such a finding where a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis. Any such finding shall be based upon objective medical evidence and shall be supported by a reasoned medical opinion. A reasoned medical opinion is one which contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id.

Dr. Simpao, Board-certified in Internal Medicine and Pulmonary Disease, conducted a physical examination on April 29, 2002. (DX 11; CX 1). He also performed a chest x-ray, pulmonary function test, and arterial blood gas study. He recorded that the Claimant performed underground coal mine for thirty-five years. He also noted a smoking history of thirty years at a rate of one pack per week with the Claimant currently smoking. His report stated that the Claimant suffered from sputum production of one tablespoon (15 years), wheezing (15 years), cough (15 years), dyspnea (20 years), hemoptysis (15 years), chest pains on exertion, orthopnea (15 years), ankle edema (15 years), and paroxysmal nocturnal dyspnea (15 years). A chest examination revealed "few crepitations with distant breath sounds occasional forced expiratory wheezes," "tactile fremitus increased right over left," and "increased resonance upper chest and axillary areas." An EKG indicated "sinus bradycardia with nonspecific ST changes." Dr. Simpao diagnosed pneumoconiosis, based on a history of dust exposure, a positive x-ray finding, a pulmonary function test, arterial blood gas analysis, physical findings, and symptomatology. He further opined that the Claimant suffers from a severe impairment due to pneumoconiosis. He also stated that the Claimant is not able to perform the work of a coal miner or to perform comparable work in a dust free environment.

A supplemental report from Dr. Simpao dated December 2, 2004 was offered into evidence. (DX 41). He reiterated his finding set forth above and stated that if the Claimant's

employment history was twenty-four and a half years, that would still be a significant contributor to his impairment. He also noted that the Claimant's long smoking history influenced his total disability.

Dr. Broudy, certified in Internal Medicine and Pulmonary Diseases, conducted a physical examination on July 2, 2002. (DX 14). He ordered a chest x-ray, pulmonary function test, and arterial blood gas study. Dr. Broudy recorded that the Claimant started smoking as a teenage and consumed a pack per day; however, he reduced his smoking to one pack per week. He also listed a coal mine employment history of thirty-five years. His report noted that the Claimant suffered from shortness of breath, daily cough, daily sputum production, dyspnea on exertion, a history of wheezing, swelling of the ankles and hands, and blood production from cough. He stated the Claimant experiences trouble at night due to shortness of breath. A chest examination revealed hyperesonant to percussion, diminished aeration, poor forced vital capacity maneuver, and expiratory delay with slight wheezing on forced expiration. Arterial blood gas analysis showed mild hypoxemia.

Dr. Broudy opined the Claimant did not suffer from pneumoconiosis. (DX 14). He relied upon a negative x-ray, qualifying pulmonary function studies, and non-qualifying arterial blood gas analysis. However, he did opine that the Claimant suffered from chronic obstructive pulmonary disease and coronary artery disease. He was able to determine that the Claimant's chronic obstructive pulmonary disease did not relate to his coal dust exposure based on a negative x-ray and the fact that the Claimant's lung function continued to decrease after leaving coal mine employment along with objective medical testing listed above. Dr. Broudy did find that the Claimant was totally disabled and could not perform the work of an underground coal miner. He noted the Claimant's impairment resulted from chronic airway disease which was due to his long cigarette smoke exposure. In sum, I find his report well-reasoned and well-documented.

Dr. Dahhan, certified in Internal Medicine and Pulmonary Diseases, conducted a physical examination on June 4, 2003. (DX 23). He also performed a chest x-ray, pulmonary function test, and arterial blood gas study. He recorded that the Claimant worked thirty-four years in coal mine employment. He also listed a smoking history for the Claimant which began at the age of eighteen, at a rate of one pack per day, until a year prior to the exam when the Claimant reduced his smoking to one pack per week. His report noted that the Claimant suffered from daily cough, daily sputum production, occasional wheezing, chest pain, and dyspnea on exertion. A chest examination was normal, and an EKG was also normal with nonspecific ST changes. An arterial blood gas revealed hypoxemia. After evaluating Dr. Simpao's medical report and corresponding objective testing, along with a report from Dr. Burki invalidating the pulmonary function studies, Dr. Dahhan stated that the Claimant did not have coal workers' pneumoconiosis. He based his opinion on obstructive abnormalities on the clinical examination of the chest, obstructive abnormalities on the pulmonary function studies, and a negative x-ray. He further stated that the Claimant suffers from chronic obstructive lung disease. In addition, he opined that the Claimant is not able to perform his previous coal mine employment. He listed that the Claimant's pulmonary impairment resulted form his smoking habit, as his reported carboxyhemoglobin levels show continued cigarette exposure of one pack per day. Dr. Dahhan testified to the same in his deposition, stating the Claimant did not have clinical or legal pneumoconiosis. (EX 1). I find his report well-documented and well-reasoned.

On May 28, 2003, Dr. Baker, Board-certified in Internal Medicine and Pulmonary Diseases, performed a physical exam of the Claimant. (DX 23A). He also conducted various diagnostic tests including a chest x-ray, a pulmonary function test, and an arterial blood gas analysis. He recorded that the Claimant worked approximately thirty-four years in coal mine employment. He noted the Claimant began smoking at age eighteen at a rate of one pack per day which he continued until eight years ago when he reduced his smoking to one pack per week. Dr. Baker stated that the Miner has breathing difficulties, with variable symptoms of daily cough (20 years), daily sputum production (20 years), daily wheezing (20 years), daily dyspnea on exertion (20 years), hemoptysis (several years), chest pain (9-10 years), orthopnea (20 years), ankle edema (20 years), and paroxysmal nocturnal dyspnea (10 years). Dr. Baker's chest examination revealed decreased breath sounds.

Dr. Baker made the following diagnosis: 1) coal workers' pneumoconiosis – based on an x-ray and coal dust exposure; 2) hypoxemia – based on arterial blood gas analysis; 3) chronic bronchitis - based on history of symptoms; 4) chronic obstructive pulmonary disease with moderate obstructive ventilatory defect – based on pulmonary function study; and 5) ischemic heart disease based on history and physical examination. (DX 15). He listed diagnoses two through four were attributed to the Claimant's coal dust exposure and smoking habit. Furthermore, Dr. Baker noted that the Claimant has a moderate impairment due to cigarette smoke and coal dust exposure. Additionally, Dr. Baker stated the Claimant can no longer return to coal mine employment. He based his opinion on the Claimant's FEV_1 values being 49% of predicted.

Dr. Baker's diagnosis of clinical pneumoconiosis is based solely upon his own readings of a chest x-ray and the Claimant's history of dust exposure. In Cornett v. Benham Coal Inc., 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute sound medical judgment under Section 718.202(a)(4). Id. at 576. The Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. See Worhach v. Director, OWCP, 17 BLR 1-105, 1-110 (1993)(citing Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-113(1989), and Taylor v. Brown Badgett, Inc., 8 BLR 1-405 (1985)). In Taylor, the Board explained that the fact that a miner worked for a certain period of time in the coal mines alone does not tend to establish that he does not have any respiratory disease arising out of coal mine employment. Taylor, 8 BLR at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray... and not a reasoned medical opinion." Id. Acknowledging that Dr. Baker performed other physical and objective testing, he listed that he expressly relied on the Claimant's positive x-ray and coal dust exposure for his clinical determination of pneumoconiosis. Moreover, he failed to state how results from his other objective testing might have impacted his diagnosis of pneumoconiosis. As he does not indicate any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history, I find his report with respect to a diagnosis of clinical pneumoconiosis neither well-reasoned nor well-documented.

Moreover, the Board has held that an administrative law judge can properly discredit a physician's opinion based upon an x-ray study that was later interpreted as negative for the

existence of the disease by a B-reader and a pulmonary function study that was invalidated. See Armoni v. Director, OWCP, 6 B.L.R. 1-423. Dr. Simpao relied upon an x-ray that he interpreted as positive; however, the x-ray was subsequently read by Dr. Poulos as negative. (DX 21). Dr. Poulos is a B-reader and Board-certified radiologist. Also, Dr. Burki, a specialist, found Dr. Simpao's initial pulmonary function was unacceptable because of less than optimal effort, cooperation, and comprehension as shown by variable curve shapes. (DX 11). Accordingly, I grant less weight to Dr. Simpao's determination of clinical pneumoconiosis.

Pursuant to Section 718.201(a)(2), "legal pneumoconiosis" includes any chronic lung disease or impairment arising out of coal mine employment. This definition includes any chronic restrictive or obstructive pulmonary disease. Drs. Dahhan, and Broudy diagnosed the Claimant with hypoxemia. (DX 14, 23). However, neither physician indicated that the disease was chronic; thus, these opinions do not constitute legal pneumoconiosis. Moreover, Dr. Broudy stated that the Claimant also suffered from chronic airway disease while Dr. Dahhan opined that the Claimant had chronic obstructive lung disease. Id. Both doctors attributed these diseases to the Claimant's long smoking history and not his coal dust exposure. Therefore, these diagnoses do not qualify as legal pneumoconiosis.

Dr. Baker diagnosed the Claimant with chronic obstructive pulmonary disease with a moderate obstructive ventilatory defect based on pulmonary function studies, hypoxemia based on arterial blood gas analysis, and chronic bronchitis based on a history of symptoms. (DX 23A). However, Dr. Baker did not indicate if his diagnosis of hypoxemia was chronic; thus, that opinion will not constitute legal pneumoconiosis. With respect to his determinations of chronic bronchitis, Dr. Baker attributed the disease to the Claimant's coal dust exposure and smoking history. Although this diagnosis constitutes a finding of legal pneumoconiosis, it is neither well-reasoned nor well-documented. A reasoned medical opinion is one which contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data upon which he bases his diagnosis. Id. Dr. Baker only relied upon the Claimant's reported history of symptoms to opine chronic bronchitis. He failed to cite to any objective medical testing or data that was supportive of his determination. Moreover, he does not list any prior diagnoses of bronchitis by other physicians that would indicate chronic bronchitis. Finally, Dr. Baker opined that the Claimant's chronic obstructive pulmonary disease was related to cigarette smoking and coal dust exposure. His determination was based upon a qualifying pulmonary function study. Therefore, Dr. Baker's report regarding legal pneumoconiosis, specifically the diagnosis of chronic obstructive pulmonary disease, is well-reasoned and well-documented.

Accordingly, I find that the Claimant has not established the existence of pneumoconiosis per Section 718.202(a)(4), by a preponderance of the evidence. I rely upon the well-reasoned and well-documented opinions of Drs. Broudy and Dahhan versus the well-documented and well-reasoned opinion regarding legal pneumoconiosis by Dr. Baker. As the existence of pneumoconiosis is the threshold issue in any claim for black lung benefits under the Act, entitlement to benefits under the Act is not established.

Total Disability:

Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b). Total disability can be established pursuant to one of the four standards in Section 718.204(b)(2) or the irrebuttable presumption of Section 718.304, which is incorporated into Section 718.204(b). The presumption is not invoked here because there is no x-ray evidence of large opacities classified as category A, B, or C, and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in Section 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under Section 718.204(c), the precursor to § 718.204(b)(2), that all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195, 1-198 (1986); Rafferty v. Jones & Laughlin Steel Corp., 9 BLR 1-231, 1-232 (1987). Furthermore, the Claimant must establish this element by a preponderance of the evidence. Gee v. W.G. Moore & Sons, 9 BLR 1-4, 1-6 (1986).

Subsection (b)(2)(i) of § 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV_1[4] values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC[5] or MVV[6] values equal to or less than the applicable table values. Alternatively, a qualifying FEV_1 reading together with an FEV_1/FVC ratio of 55% or less may be sufficient to prove disabling respiratory impairment under this subsection of the regulations. § 718.204(b)(2) and Appendix B. The record consists of five newly submitted pulmonary function studies.[7] (DX 11, 14, 23, 23A). The study performed on April 29, 2002 was invalidated by Dr. Burki, who found the study unacceptable because the Claimant gave less than optimal effort, cooperation, and comprehension. (DX 11). The study dated August 12, 2002 produced non-qualifying results. The tests performed on July 2, 2002, June 4, 2003, and May 28, 2003 produced qualifying values indicative of total disability. Thus, I find the pulmonary function study evidence of record establishes total disability under subsection (b)(2)(i).

Section 718.204(b)(2)(ii) provides for the establishment of total disability through the results of arterial blood gas tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of pCO2 to pO2, which indicates the presence of a totally disabling impairment in the transfer of oxygen from the Claimant's lung alveoli to his blood. § 718.204(c)(2) and Appendix C. The test results must meet or fall below the table values set

[4] Forced expiratory volume in one second.

[5] Forced vital capacity.

[6] Maximum voluntary ventilation.

[7] The fact finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983). I find the Miner's height to be 71.5 inches.

forth in Appendix C following Section 718 of the regulations. Four studies have been entered into the record. (DX 11, 14, 23, 23A). The studies dated July 2, 2002 and June 4, 2003 are non-qualifying pursuant to Section 718.105(c)(2). The studies conducted by Drs. Simpao and Baker produced non-qualifying values under the regulatory standards for disability. Therefore, I find that the blood gas study evidence of record fails to establish total disability under subsection (b)(2)(ii).

Total disability under Section 718.204(b)(2)(iii) is inapplicable because the Claimant failed to present evidence of cor pulmonale with right-sided congestive heart failure.

Finally, the Claimant establishes total disability under Section 718.204(b)(2)(iv). Where total disability cannot be established under subparagraphs (b)(2)(i), (b)(2)(ii) or (b)(2)(iii), Section 718.204(b)(2)(iv) provides that total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable gainful work.

Four newly submitted medical reports have been offered into evidence. Dr. Simpao found that the Claimant had a severe, disabling impairment that resulted from his pneumoconiosis. (DX 11, 41; CX 1). He also opined the Claimant could not perform his prior coal mine job. Dr. Simpao relied on a qualifying pulmonary function test, a positive x-ray, EKG results, physical findings, and symptomatology. I find his report well-reasoned and well-documented.[8]

Also, Dr. Broudy opined the Claimant was totally and permanently disabled from a respiratory or pulmonary impairment. (DX 14). He noted that the Claimant could not return to coal mine employment or other similarly arduous manual labor. Moreover, Dr. Broudy stated that the Claimant's total disability was due to his obstructive airway disease which resulted from his cigarette smoking. He relied upon a negative x-ray, a qualifying pulmonary function study, a non-qualifying arterial blood gas analysis, and an abnormal chest exam. In sum, I find his report well-documented and well-reasoned.

Dr. Dahhan opined that the Claimant had a totally disabling respiratory impairment due to his smoking habit. (DX 23). The Claimant's carboxyhemoglobin level continued to show exposure of over one pack of cigarettes per day. Dr. Dahhan stated that the Claimant could not perform his last coal mine employment. Dr. Dahhan relied upon a negative x-ray, a qualifying pulmonary function study, and a non-qualifying arterial blood gas analysis. Thus, I find his opinion with respect to total disability well-reasoned and well-documented.

Furthermore, Dr. Baker opined the Claimant suffered from a moderate impairment due to a combination of cigarette smoke and coal dust. (DX 23A). He noted that the Claimant could not

[8] A medical opinion does not have to be wholly reliable or wholly unreliable, rather the opinion can be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue. See Drummond Coal Co. v. Freeman, 17 F.3d 361 (11th Cir. 1994); Billings v. Harlan #4 Coal Co., B.R.B. No. 94-3721 BLA (June 19, 1997) (en banc) (unpub.). Accordingly, I divide Drs. Simpao's and Baker's opinions into the relevant issues of pneumoconiosis and total disability.

return to coal mine employment or other similarly arduous manual labor. Dr. Broudy stated that the Claimant's total disability was due to his obstructive airway disease which resulted from his cigarette smoking. He stated that he relied upon FEV_1 values that are forty-nine percent of the predicted values, indicating total disability.

All of the physicians of record opined that the Claimant is totally disabled. (DX 11, 14, 23, 23A). Accordingly, I find total disability pursuant to Section 718.204(b)(2)(iv) has been proven. Acknowledging that the arterial blood gas evidence was non-qualifying, I rely on the medical reports as well as the qualifying pulmonary function testing to conclude that the Claimant has established total disability by a preponderance of the evidence per Section 718.204(b)(2). As such, the Claimant has proven a material change in condition and the entire record must be examined.

The Claimant has only one previous claim which was filed in 1992. (DX 1). The medical evidence in that claim dates prior to March 1996. The Board has held that it is proper to afford the results of recent medical testing more weight over earlier testing. See Stanford v. Director, OWCP, 7 B.L.R. 1-541 (granting greater weight to a more recent x-ray); Coleman v. Ramey Coal Co., 18 B.L.R. 1-17 (1993) (granting greater weight to a more recent pulmonary function study); Schretroma v. Director, OWCP, 18 B.L.R. (1993) (granting greater weight to a more recent arterial blood gas analysis); Gillespie v. Badger Coal Co., 7 B.L.R. 1-839 (1985) (granting greater weight to a more recent medical report). As the medical evidence in the Miner's previous claim is over nine years old, I grant greater weight to the newly submitted evidence. Accordingly, I continue to rely on the newly submitted evidence to find that the Claimant has not established pneumoconiosis, but has proven total disability.

Total Disability Due to Pneumoconiosis:

Assuming, arguendo, that the Claimant had established pneumoconiosis, the Claimant is nonetheless ineligible for benefits because he fails to show total disability due to pneumoconiosis as demonstrated by documented and reasoned medical reports. See § 718.204(c)(2). In interpretting this requirement, the Sixth Circuit has stated that pneumoconiosis must be more than a de minimus or infinitesimal contribution to the miner's total disability. Peabody Coal Co. v. Smith, 127 F.3d 504, 506-507 (6th Cir. 1997). The only well-reasoned and well-documented opinions regarding pneumoconiosis and total disability are those of Drs. Broudy and Dahhan. Both physicians opined that the Claimant was totally disabled due to conditions that arose from his smoking history. Therefore, I find that the Claimant has failed to establish total disability due to pneumoconiosis, by a preponderance of the evidence, per § 718.204(c)(1).

Entitlement:

As the Claimant has established total disability, he has established a material change in condition. However, after reviewing the entire record, he has failed to prove the existence of pneumoconiosis and total disability arising therefrom. Accordingly, he is not entitled to benefits under the Act.

Attorney's Fees:

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any attorney's fees to the Claimant for legal services rendered in pursuit of benefits.

ORDER

It is thereby ORDERED that the claim of JOHN CHANEY for benefits is hereby DENIED.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.